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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

E070567

v.

(Super.Ct.No. FWV1504178)

EUGENE MIROSKINS,

OPINION

Defendant and Appellant.

APPEAL from the Superior Court of San Bernardino County. Elia V. Pirozzi, Judge. Affirmed.

Eugene Miroskins, in pro. per.; and Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. <u>PROCEDURAL BACKGROUND</u>

On November 9, 2015, a felony complaint charged defendant and appellant Eugene Miroskins with one count of possession or control of child pornography under Penal Code¹ section 311.11, subdivision (a). On October 24, 2016, an information charged defendant with the same crime under section 311.11, subdivision (a).

On July 5, 2016, defense counsel filed two motions in limine: (1) to unseal the search warrant affidavit under *People v. Hobbs* (1994) 7 Cal.App.4th 948; and (2) to quash the search warrant under section 1538.5. On July 13, 2016, the People filed a response to both motions. On November 28, 2016, the San Bernardino trial court first denied the motion to unseal the search warrant affidavit.

The Court: "[W]e have the sealed affidavit from the Los Angeles Court. The motion to unseal that affidavit was previously denied by the Los Angeles Court, is my understanding.

"[The Prosecutor]: Correct.

"The Court: So we're not going to revisit that issue. That issue has already been litigated against [defendant] in Los Angeles."

Then, as to the motion to quash, the court stated: "But what we are going to do is I'm going to take a look at the motion to quash, which is sort of implicit and part of the motion to suppress from the 1538.5 and look at whether or not the police had legal

¹ All further statutory references are to the Penal Code unless otherwise specified.

authority, based on the affidavit submitted from Los Angeles court to go to [defendant's] house in Rancho Cucamonga." After discussion from defense counsel and the prosecutor, the court conducted an in-camera review of the documents relating to the motion to quash. After going back on the record, the court denied defendant's motion and gave a detailed explanation for the denial:

"[Defendant] I did review the information. I took a look at the initial affidavit, and certainly, there was a lack of information in the public portion of the affidavit. And so I made that decision to unseal the information. And reviewing of sealed affidavit from that process comes two things, one, I agree with the Court's decision to seal that information to begin with that there is a concern appropriate reasons under the Court's decision to keep the decision there is no reason to unseal it at this time and interview of the Court. [Sic.] The reasons for it to be sealed will remain and the benefit to your client in terms of charges in this case to have it unsealed, there are none. The reasons it[is] sealed are not of relevance to guilt or innocence based on current charges.

"That's one thing. I also looked at on the two issues that you raised the salience and whether there was a nexus and the salience issue was—is not much of an issue based on the information in the affidavit. [Sic.] The affidavit is referencing an ongoing investigation that takes place over a period of time. It is an ongoing. The most recent information in the affidavit is within 10 days. It's not a 60-day or more, so that wasn't much of an issue.

"In terms of the nexus, the nature of the ongoing investigation, the nature of the ongoing enterprises described in the warrant in the view of this Court is sufficient nexus

to the residence. There's certainly what is called probable cause to believe that evidence of felony conduct would be located in the residence. On that basis, the motion is denied."

Thereafter, defense counsel asked to withdraw as counsel because he was retained only for the preliminary hearing. The court granted defense counsel's request to be relieved and appointed the San Bernardino County Public Defender's Office to represent defendant.

On December 18, 2017, the trial court relieved the public defender's office and allowed defendant to represent himself.

On December 21, 2017, the trial court held an evidentiary hearing under Evidence Code section 402. At the conclusion of the hearing, the trial court found that Detective Ryan Lombardi qualified as a computer forensics expert. The court also found that the probative value of two videos, which formed the basis of the charge against defendant outweighed any prejudice. Therefore, the court found the videos to be admissible.

On January 4, 2018, the prosecutor indicated that there were 10 newly-discovered images on defendant's laptop; she wanted to introduce these images under Evidence Code section 1101, subdivision (b). After an evidentiary hearing on January 9, 2018, the trial court ruled that eight of the 10 images were admissible under Evidence Code section 1101, subdivision (b). The court also indicated that it would give a limiting instruction to the jury.

On January 17, 2018, defendant moved to preclude the two videos in question.

Defendant stated he was willing to admit that the two videos constituted child pornography. The prosecutor, however, refused to stipulate. The court ruled that the

videos could be shown. After the completion of voir dire, trial on the case commenced on January 17, 2018.

On January 18, 2018, after Detective Lombardi's testimony, defendant moved for a mistrial. As a basis for the motion, defendant argued that "the prosecution introduced incorrect evidence" because Detective Lombardi testified that two self-images were discovered in the downloads folder in defendant's computer, when the pictures had been located in the pictures folder. The trial court denied defendant's motion.

On January 22, 2018, the jury found defendant guilty. The trial court remanded defendant to custody.

On February 16, 2018, the trial court reappointed the public defendant's office to represent defendant and noted that "[t]he defendant is no longer in Pro Per status." On May 4, 2018, defense counsel moved to have defendant's conviction reduced to a misdemeanor under section 17, subdivision (b). The trial court denied the motion. The court noted, "I do believe that this conduct did rise to the level of felony conduct. I did see the videos and was stressed after seeing the disgusting material that was, that existed on [defendant's] computer. And considering the facts that the Court is required to consider under 17(b) motion, the Court respectively denies the request to reduce the 311.11 charge to a misdemeanor." The court then denied probation because of the nature of the video; the minimal responsibility defendant took; and defendant's "relatively cavalier and casual attitude about the crime, in which he described it during trial as humorous." The court, however, found that the factors in mitigation outweighed those in aggravation and imposed the low term of 16 months. The court then awarded defendant

credit of 208 days. The court ordered defendant to register as a sex offender under section 290. On May 21, 2018, defendant filed a timely notice of appeal.

On June 29, 2018, the trial court heard defendant's motion for the return of property. Defense counsel argued that family photos and business records stored on the seized laptop should be returned before the computer was wiped clean and/or destroyed. The People agreed "there are items on the computer that do not consist of contraband, or items that . . . do not violate the law, but unfortunately it's not that simple. These items are mixed in with various other items that are considered contraband and are child pornography. If the situation was as simple as the business records or family photos were on a separate flash drive, the People would have no issue with just handing that over, but Glendora Police Department has a very specific policy that they don't just hand over digital data until it has been completely erased, and there's a valid reason for that in that this information could, if the digital data is not completely erased we could be handing over potentially hidden files, encrypted data that could possess contraband on it." Moreover, the People responded that it was too burdensome to get data off the computer. The court denied the motion without prejudice. On July 5, 2018, defendant filed a second notice of appeal from the denial of his motion for the return of property.

B. FACTUAL BACKGROUND

1. PROSECUTION CASE

On April 24, 2015, Glendora Police Officer Alexander Stein executed a search warrant at defendant's home in Fontana. According to the officer, "[t]he investigation

was not initially a child pornography investigation." During the search of defendant's home, Detective Stein located a MacBook laptop underneath defendant's bed.

The laptop was turned over to Detective Ryan Lombardi for forensic analysis.

The detective started his analysis by making an exact duplicate of the hard drive. During the copying process, Detective Lombardi put a "write blocker" on the drive to prevent anything being written on the drive. The detective found two videos in the computer's download folder; they had been downloaded from a now defunct file-sharing website called "Zshare.net."

The first video file was entitled "7.AVI." Detective Lombardi testified that AVI is a common video format used on the internet. The video was downloaded on April 11, 2010, and last opened on August 29, 2014. This video depicted an underage nude female.

The second video was entitled "SisterKiss.mpg." The video was downloaded on March 21, 2010, and last opened on August 29, 2014. The video showed two nude, underage females kissing and behaving in a sexual manner. The text at the beginning of the video read: "Two Sisters[,] 12 and 13 bored and home alone."

Detective Lombardi testified that he believed that both videos showed real girls under the age of 18. Both of the videos had been previously flagged by other law enforcement agencies. The detective found no viruses and both videos played on the computer.

In December of 2017, Detective Lombardi analyzed defendant's hard drive again and discovered a folder labeled "C.P. and More," which was inside a folder marked

"Porn, Yay." The "C.P. and More" folder contained seven images of real people and one cartoon drawing. The seven images depicted nude females, who were underage or borderline underage. The cartoon was a drawing of a character known as "Pedo Bear," which has become a mascot for pedophiles. All of the images were downloaded in 2010 within a minute of each other. The images were last opened on December 12, 2010. The People did not file any charges based on these images. The detective also discovered what appeared to be two "selfies" of defendant in the pictures folder.

2. DEFENSE CASE

Defendant testified that he never tried to access child pornography illegally. He did not believe that the "7.AVI" file would play on his computer. Defendant admitted that nobody else used his computer. He also admitted that he created the "C.P. and more" file. He downloaded the images because he thought they were funny. He did not believe he was committing a crime.

DISCUSSION

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. On February 15, 2019, defendant filed a 17-page supplemental brief. In his brief, defendant essentially argues that the trial court erred in denying his motion in

limine to preclude the two videos found on his computer: "I ask the court to overrule the lower court's decision to allow the playback of the pornography to the jury in the interest of justice, to recognize that no harm would have come to the prosecution's case and their ability to present it, and that, specifically within the framework of facts and circumstances spelled out below, not playing the videos, in their entirety, with sound on maximum volume, would have been the only way to preserve an objective, unbiased audience of jurors who would have taken the time to diligently weigh the facts of the case presented before them, and perform their function as fact finders to determine guilt or innocence in this case, finding whether the evidence supports the charge of possession or control of obscene matter depicting a minor, without confusion of issues and formation of irrevocable, misappropriated bias."

The abuse of discretion standard of review applies to any trial court ruling on the admissibility of evidence. (*People v. Guera* (2006) 37 Cal.4th 1067, 1113.) Discretion is abused when a court exceeds the bounds of reason when all circumstances are considered. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) On appeal, defendant has failed to address the abuse of discretion standard of review and simply treats the appeal as a new forum to argue his in limine motion.

At the hearing on the motion in limine, the court asked defendant: "All right. . . . I know you're making an argument now concerning the veracity and strength of an expert opinion, and also inconsistencies potentially, and lack of credibility with regard to that witness, but is there anything from an evidentiary standpoint that you're objecting to as to the admissibility of these two videos under the Evidence Code?" Defendant responded:

"[Under] the Evidence Code, I do not believe the two pieces of evidence are admissible, because that determination, whether or not they are real girls, and indeed, under the age of 18, can only be made by qualified experts with experience in image forensic and human biological development."² The prosecutor then argued that "[t]hose are determinations for the jury to make. And how I prove those is through my expert and through showing the jury the actual evidence. I'm not really following the argument to exclude the actual evidence." Thereafter, the court, the prosecutor and defendant discussed what evidence could be presented and what the jury had to determine based on the evidence presented. After giving defendant ample opportunity to make his arguments in support of his motion in limine, the trial court provided detailed reasons for denying defendant's motions. In sum, the trial court found that "the probative value of the videos in their totality here is very high," and admitted the videos into evidence. Based on the circumstances of this case, we cannot say that the trial court's rulings exceed the bounds of reason. Therefore, the trial court did not abuse its discretion in denying defendant's in limine motion.

We have now concluded our review of the record and find no other issues.

² In his personal brief, defendant states: "I dismissed my public defender and continued the trial in propria persona for the sole reason that my public defender insisted on arguing that there was no evidence that the videos contained child pornography and that the girls in the videos were not 'real girls'. Such an argument is infantile in logic, but it is brilliant in its assistance to the prosecution, as it provides the prosecutor the Reason and Necessity to play the videos in order to establish 'Component 1' [does the matter depict obscene matter as defined in PC 311.11?] explained above." Although defendant argues that he rejected this reasoning, the transcript from the hearing on the motion provides otherwise.

DISPOSITION

The judgment is affirmed.

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| | | MILLER | | |
|------------|----|--------|--------------|--|
| | | | Acting P. J. | |
| We concur: | | | | |
| CODRINGTON | J. | | | |
| SLOUGH | | | | |